



The law and practice of the Ireland–Northern Ireland Protocol

Gary Simpson

Queen's University Belfast

Correspondence email: gsimpson08@qub.ac.uk

The Law and Practice of the Ireland–Northern Ireland Protocol,
Christopher McCrudden (ed) (Cambridge University Press 2022)
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The decision of the United Kingdom (UK) to leave the European Union (EU) in June 2016 gave birth to a considerable headache for those wishing to secure the UK's departure from the EU in a timely and 'orderly fashion'.¹ Prior to reaching any agreement regarding the UK's withdrawal from the EU, much less any future trade agreement, the EU made clear that a solution to the 'Irish border conundrum'² was first and foremost its primary concern. Fast-forward three years, to 2019, and the Ireland–Northern Ireland Protocol to the EU Withdrawal Agreement (the Protocol), to which both the UK and EU were co-signatories, was the agreed-upon solution 'to address the difficult and complex impact of Brexit on the island of Ireland'.³

As the UK Government (UKG) in June 2022 proposed legislation (at the time of writing awaiting its second reading in the House of Lords) in the form of the Northern Ireland Protocol Bill (NIPB), which would see a 'root and branch overhaul of the principal commitments in the protocol',⁴ the relevance of Christopher McCrudden's edited collection of 25 essays once again proves its dependability as a legal resource, having previously been cited heavily in the *Allister* judgment in the Northern Ireland Court of Appeal.⁵ With many facets of the Protocol's legality having been challenged, the importance of a concise explanatory analysis and interpretation of its substantive legal aspects remains an unequivocally helpful reference point. Whilst the book can be said to have addressed a moving target, prospective readers should

- 1 Prime Minister Theresa May's Statement to the House of Commons (12 March 2019).
- 2 Michael Keating, 'The Irish Border Conundrum' (Centre on Constitutional Change 8 December 2017).
- 3 Christopher McCrudden, *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) i.
- 4 Catherine Barnard 'Why is there so much fuss over the Northern Ireland Protocol Bill?' (*UK in a Changing Europe* 20 June 2022).
- 5 *Allister & Ors v Secretary of State for Northern Ireland* [2022] NICA 15.

bear in mind the book's objective, which is to examine the fundamental legal aspects to the Protocol, and that it was written in consideration of those purposes for which it was initially envisaged. Given certain contentions now ever-more prevalent surrounding interpretation of the Protocol's legalities, a documented academic examination of the Agreement's 'legal dimensions' (as envisioned when signed between the EU and UKG) proves invaluable in combating any subsequent distortions of its perceived purpose, as well as its purported legal authority and any such contention to the contrary.

The book brings together wide-ranging expertise from academic scholars and legal practitioners. With this broad church of expertise, the book does not confine its audience simply to the lawyer or the scholar, instead, proving a valuable 'go-to' for all those wishing to grapple with the Protocol in its wider legal context. As does the Protocol, the book covers a vast canvas of issues including governance, rights, citizenship and judicial matters, to form an 'important and informative Brexit resource'⁶ for readers wishing to understand any of the niche and highly (Northern Ireland) specific legal crevasses the Protocol addresses.

Whilst there are 25 chapters, the book is subdivided into nine parts. McCrudden introduces discussion by characterising the Protocol in terms of how it ought best be understood, which, as he explains, is within the context of aspirations to safeguard the Belfast–Good Friday Agreement (GFA), and in reflection of the dynamics of a volatile UK political landscape, as well as in consideration of the subsequently agreed Trade and Cooperation Agreement. This introduction acts as a caveat to the book's thematic approach in its analysis of the Protocol's legal scope. McCrudden outlines extensively how joint Irish and British EU membership helped not only in the peace negotiations in terms of trust leading up to the 1998 GFA, but also how it continued to facilitate the peace process more generally through the creation of an all-island economy and continued common identity as joint EU member states. The extent to which the EU's initial approach to the 'Northern Ireland difficulty' was primarily influenced by Ireland's early concerns regarding Brexit is highlighted, however, it is shown the EU's unapologetic approach to such negotiations goes well beyond any perceived 'one-sidedness',⁷ given its rightful outlook on the GFA and overall peace process as a 'success story to which it had contributed'

6 Sir Declan Morgan, Lord Chief Justice of Northern Ireland (2009–2021), 'The law and practice of the Ireland–Northern Ireland Protocol' in McCrudden (n 3 above) 'Foreword' xii.

7 Secretary of State for Northern Ireland Brandon Lewis, Oral Answers to Questions: 'Northern Ireland Protocol: EU negotiations' HC Deb 27 October 2021, vol 702, col 253.

and given the potential jeopardy posed to this by the UK's decision to exit the EU.

The forementioned introduction bodes well for Part I in which Harvey subsequently contextualises the 1998 Agreement's 'foundational constitutional quality as a peace, as well as political, agreement' and its legality as a 'bilateral treaty'. Harvey emphasises the EU's focus in safeguarding the primacy of the GFA at the heart of its negotiating mandate to ensure the effects of Brexit would not be permitted to destabilise the peace process. He also observes the fact that most 'anchor their argumentative strategy around its defence',⁸ and that interpretation of such approximations will no doubt be at the heart of any future legal contestation.

Parts II and IV of the book address EU governance and governance of the Protocol in Ireland and the UK, respectively, with chapters dedicated to legal structures, the Protocol's committees and dispute settlement, as well as how the Protocol interacts with UK, Irish, and Northern Irish law. Part III addresses interpretation of the agreements, with contributions from Weatherill and Ratner outlining 'what the Protocol does and why it does it' as well as how the agreements may engage with the 'idiosyncratic' nature of the Vienna Convention on the Law of Treaties. McCrudden also addresses 'good faith' in this section, in a chapter in which those charged with the ratification and application of the Protocol in UK law may wish to consider reading more than once, perhaps while also revising their understanding of the words 'spirit' and 'sincere'.

Parts V and VI analyse fundamental rights as well as citizenship and free movement, each outlining the importance of replicating in the Protocol the emphasis placed on such provisions as fundamental in the GFA. In Part V, McCrudden discusses the application of article 2 of the Protocol in relation to human rights and equality, emphasising the need to prevent derogations caused by Brexit to those same rights secured under the GFA. McCloskey LJ analyses the UK's 'retreat' from the Charter of Fundamental Rights whilst examining its role in Northern Ireland in tandem with the intricacies of the Protocol's legal arrangements alongside the nuances of Northern Ireland citizenship, in what he describes as 'murky waters'.

Maher begins Part VI by outlining the importance of the continuation of the Common Travel Area (CTA) post-Brexit. Maher describes the CTA as an arrangement 'defined more by pragmatism

8 One notes the UKG's legal reasoning of 'necessity' under art 25 of the International Law Commission's articles of Responsibility of States for Internationally Wrongful Acts for their justification of the NIPB stating 'maintenance of stable social and political conditions in Northern Ireland and protecting the Belfast (Good Friday) Agreement are essential UK interests'. See Barnard (n 4 above).

than by law', and one that she expects to comfortably overcome any of the political or legal challenges regarding borders which Brexit may pose. As alluded to by McCloskey LJ, Brexit raised considerable issues surrounding identity and citizenship in Northern Ireland as secured under the GFA. Murray furthers this discussion by outlining the divisive nature of Brexit in its reassertion of 'core identities' in Northern Ireland. Murray also points out that it was in fact the Democratic Unionist Party which championed Brexit in the belief this would solidify its British identity by 'intensifying Northern Ireland's distinctiveness from Ireland', theoretically hampering the case for a united Ireland. The irony that Brexit produced the Protocol to ensure the maintenance of the GFA (the guarantor to identity and citizenship in Northern Ireland), and is thus now the source of unionist identity concerns, will not be lost on most.

The largest section of the book, Part VII, elaborates on the economic law within the Protocol, with notable contributions on the Irish Sea border, competition law, state aid and the free movement of services. Jerzewska outlines the functioning of the Irish Sea customs border and how it impacts on businesses trading between Great Britain and Northern Ireland. She also notes the UK's proposal of a 'radical renegotiation' of the Protocol in the form of the UK Government's July 2021 Command Paper having been immediately dismissed by the Commission. Said paper, when placed in comparison with the NIPB, almost exactly a year later, serves only to illustrate the fundamental hardening of attitudes within the Conservative Party regarding the Protocol's implementation (or lack thereof) at the time of writing. Power and Peretz discuss the legal framework for competition law and state aid in Northern Ireland respectively, whilst Barrett shines light on the 'shaky legal foundations'⁹ of the all-Ireland services market. Barrett notes that unlike in goods there is now a border on the island of Ireland with regards to services trade, albeit something of a 'soft' border due to a number of merciful factors. Interestingly, Barrett points out that services are of much greater economic significance, although political debate remains 'squarely on the free market for goods'.

Part VIII discusses judicial co-operation, whilst in Part IX Melo Araujo and Brittain inform the reader of the Protocol's safeguarding provisions, the now infamous article 16. The two authors explain these provisions in contrast to those typically used within World Trade Organization trade agreements and the almost paradoxical nature of article 16 as in direct contradiction with the Protocol's primary objective, namely preventing the erection of trade barriers on the island of Ireland.

9 A phrase coined in a thread tweeted by D Henig @DavidHenigUK, 26 February 2020; Gavin Barrett, 'Free movement of services' in McCrudden (n 3 above).

Overall, the book paints a much more insightful picture of the Protocol in its legal context than might be commonly construed in public discourse.¹⁰ It also highlights the considerably deeper relationship of its text with the objective of protecting the GFA than may often be understood.¹¹ The book does not gloss over Unionist concerns regarding the implementation of the Protocol, but in fact deals in political reality and legal certainty in conveying to the reader an understanding of the complexities of Northern Ireland and the overall peace process's relationship with EU membership, and the impossibility of the circle that had to be squared regarding Brexit and the Irish border.

10 'Cross-party commission to visit Northern Ireland as Prime Minister continues protocol misinformation campaign' (*UK Trade and Business Commission* 28 February 2022); David Young, 'Negative portrayal of NI Protocol is "fake news", Assembly told' *Belfast Telegraph* (27 September 2021).

11 A worrying example of this misunderstanding regarding the Protocol's relationship with the Good Friday Agreement can be seen within Suella Braverman's legal justification for scrapping parts of the Protocol in her capacity as Attorney General to Boris Johnson, describing the GFA as having 'more importance and "primordial significance"' see 'Pastor in legal challenge to Northern Ireland Protocol' *Irish News* (Belfast 19 July 2022).